

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CARRINGTON MORTGAGE SERVICES,
LLC,

Case No. 2:20-CV-699 JCM (NJK)

Plaintiff(s),

ORDER

v.

TICOR TITLE OF NEVADA, INC., et al.,

Defendant(s).

Presently before the court is plaintiff Carrington Mortgage Services, LLC's ("Carrington") motions to remand (ECF No. 13) and for attorneys' fees (ECF No. 14). Defendant Chicago Title Insurance Company ("Chicago Title") filed a response (ECF No. 40), to which Carrington replied (ECF No. 43).

I. Background

The instant action arises from an HOA superpriority lien foreclosure. Carrington is the beneficiary under a first recorded deed of trust encumbering the property located at 9508 Bluff Ledge Avenue, Las Vegas, Nevada 89149, which was subject to an HOA foreclosure sale pursuant to NRS chapter 116. (ECF No. 1-2 at 3-5). Carrington had a title insurance policy with Ticor Title of Nevada, Inc. ("Ticor Nevada") and/or Ticor Title Insurance Company ("Ticor Insurance"). *Id.* at 2-3. Chicago Title is the successor-in-interest to Ticor Insurance.¹ *Id.* at 2.

As a result of the HOA foreclosure sale, Carrington made a claim on its title insurance, which defendants denied. *Id.* at 6-9. Carrington brought the instant action in state court,

¹ Chicago Title indicates that Ticor Insurance merged into Chicago Title in 2010. (ECF No. 1 at 2).

1 alleging declaratory judgment, breach of contract, “bad faith breach of insurance contract,” and
 2 violation of Nevada Revised Statute (“NRS”) 686A.310. *See generally id.*

3 Just one day after the case was filed—before any defendants were served—Chicago Title
 4 removed this action. (ECF No. 1). Carrington now moves to remand. (ECF No. 13).

5 **II. Legal Standard**

6 “‘Federal courts are courts of limited jurisdiction,’ possessing ‘only that power
 7 authorized by Constitution and statute.’” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting
 8 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). Pursuant to 28
 9 U.S.C. § 1441(a), “any civil action brought in a State court of which the district courts of the
 10 United States have original jurisdiction, may be removed by the defendant or the defendants, to
 11 the district court of the United States for the district and division embracing the place where such
 12 action is pending.” 28 U.S.C. § 1441(a). “A federal court is presumed to lack jurisdiction in a
 13 particular case unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated*
 14 *Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

15 Upon notice of removability, a defendant has thirty days to remove a case to federal court
 16 once he knows or should have known that the case was removable. *Durham v. Lockheed Martin*
 17 *Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not
 18 charged with notice of removability “until they’ve received a paper that gives them enough
 19 information to remove.” *Id.* at 1251.

20 Specifically, “the ‘thirty day time period [for removal] . . . starts to run from defendant’s
 21 receipt of the initial pleading only when that pleading affirmatively reveals on its face’ the facts
 22 necessary for federal court jurisdiction.” *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty*
 23 *Co.*, 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). “Otherwise, the thirty-day
 24 clock doesn’t begin ticking until a defendant receives ‘a copy of an amended pleading, motion,
 25 order or other paper’ from which it can determine that the case is removable. *Id.* (quoting 28
 26 U.S.C. § 1446(b)(3)).

27 A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. §
 28 1447(c). On a motion to remand, the removing defendant faces a strong presumption against

1 removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental*
 2 *Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67
 3 (9th Cir. 1992).

4 **III. Discussion**

5 For a United States district court to have diversity jurisdiction under 28 U.S.C. § 1332,
 6 the parties must be completely diverse and the amount in controversy must exceed \$75,000.00,
 7 exclusive of interest and costs. *See* 28 U.S.C. § 1332(a); *Matheson v. Progressive Specialty Ins.*
 8 *Co.*, 319 F.3d 1098 (9th Cir. 2003). A removing defendant has the burden to prove by a
 9 preponderance of the evidence that the jurisdictional amount is met. *See Sanchez v. Monumental*
 10 *Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996).

11 Here, Carrington contends that Chicago Title’s removal violated the “forum defendant
 12 rule,” codified in 28 U.S.C. § 1441(b)(2), because codefendant Ticor Nevada is a Nevada
 13 corporation.² (*See generally* ECF No. 13).

14 **A. “Snap” removal**

15 The forum defendant rule expressly prohibits removal based on diversity jurisdiction in
 16 cases where “any of the parties in interest properly joined and served as defendants is a citizen of
 17 the [s]tate in which [the] action is brought.” 28 U.S.C. § 1441(b)(2); *see also Lively v. Wild Oats*
 18 *Mkts., Inc.*, 456 F.3d 933, 939 (9th Cir. 2006) (“Separate and apart from the statute conferring
 19 diversity jurisdiction, 28 U.S.C. § 1332, § 1441(b) confines removal on the basis of diversity
 20 jurisdiction to instances where no defendant is a citizen of the forum state.”).

21 However, the forum defendant rule “is a procedural, or non-jurisdictional, rule.” *Lively v.*
 22 *Wild Oats Markets, Inc.*, 456 F.3d 933, 939 (9th Cir. 2006). Unlike procedural rules,
 23 “jurisdictional bars cannot be waived by the parties and may be addressed *sua sponte*,” *Skranak*
 24 *v. Castenada*, 425 F.3d 1213, 1216 (9th Cir.2005).

25 The forum defendant rule’s characterization as a procedural, rather than jurisdictional,
 26 rule has led to a new form of jurisdictional gamesmanship in litigation: “snap” removal.³

27
 28 ² Carrington withdrew its objections to the amount in controversy. (ECF No. 48).

1 Because § 1441(b) bars removal when “any of the parties in interest properly joined **and served**
 2 as defendants” is a forum defendant, snap removal allows a nonforum defendant to remove an
 3 action before the diversity-defeating forum defendant is served. Although the Ninth Circuit has
 4 not endorsed the practice, several other circuit courts have. *See, e.g., Texas Brine Co., L.L.C. v.*
 5 *Am. Arbitration Ass’n, Inc.*, 955 F.3d 482, 487 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb*
 6 *Co.*, 919 F.3d 699, 705 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d
 7 147, 153 (3d Cir. 2018); *McCall v. Scott*, 239 F.3d 808, 813, n. 2 (6th Cir. 2001).

8 Here, the parties agree that Ticor Title of Nevada is a Nevada corporation and, therefore,
 9 a forum defendant. Chicago Title argues that its removal was a proper snap removal because
 10 Ticor Nevada had not yet been served. Thus, if Chicago Title’s snap removal was proper, this
 11 court has jurisdiction. If it was not, then remand is necessary.

12 In this case, the court need not—and does not—decide whether snap removals are
 13 generally allowable in this district. Instead, the court finds that Chicago Title’s snap removal
 14 was procedurally defective because Chicago Title removed this action before it was served.

15 Although not binding on this court, Judge Woodlock’s detailed discussion of snap
 16 removal in *Gentile v. Biogen Idec, Inc.* is persuasive. 934 F. Supp. 2d 313 (D. Mass. 2013). In
 17 *Gentile*, no defendant had been served prior to the nonforum defendant’s removal. *Id.* Judge
 18 Woodlock acknowledged that “[d]istrict courts are in disarray on the question presented by this
 19 case,” but ultimately adopted Judge O’Kelley’s analysis in another case, *Hawkins v. Cottrell,*
 20 *Inc.*, 785 F. Supp. 2d 1361 (N.D. Ga. 2011). *Id.* at 316. Although *Hawkins* was decided prior to
 21 the 2011 amendment of § 1441(b), Judge Woodlock found that “[t]he amendments to section
 22 1441(b) do not change the statute’s plain meaning.” *Id.* at 318.

23
 24
 25 ³ Several courts across the country have noted that the ubiquity of electronic docketing
 26 has also contributed to the rise in snap removals. *See, e.g., Delaughder v. Colonial Pipeline Co.*,
 27 360 F. Supp. 3d 1372, 1377 (N.D. Ga. 2018) (“Now referred to as snap removals, this litigation
 28 tactic has become increasingly popular in recent years due in part to the increased ease of
 electronic docket monitoring.”); *Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1243 (E.D.
 Mo. 2012) (“Pre-service removal **by means of monitoring the electronic docket** smacks more
 of forum shopping by a defendant, than it does of protecting the defendant from the improper
 joinder of a forum defendant that plaintiff has no intention of serving.” (emphasis added)).

1 In particular, the use of the word “any” in “any parties in interest properly joined and
 2 served” necessarily meant “that the statute assumes at least one party has been served; ignoring
 3 that assumption would render a court's analysis under the exception nonsensical and the statute's
 4 use of ‘any’ superfluous.” *Id.* Thus, under the plain language of the statute, “the lack of a party
 5 properly joined and served does not mean an ‘exception’ to removal is inapplicable, but rather
 6 means that an even more basic assumption embedded in the statute—that a party in interest had
 7 been served prior to removal—has not been met.” *Id.* Judge Woodlock concluded, after an
 8 extensive recitation of the history and policy behind removal, as follows:

9 Precluding removal until at least one defendant has been
 10 served protects against docket trolls with a quick finger on the
 11 trigger of removal. Under the reading I have given to section
 12 1441(b) here, plaintiffs legitimately seeking to join a forum
 13 defendant face the modest burden of serving that defendant
 14 before any others. If a plaintiff serves a non-forum defendant
 15 before serving a forum defendant, he has effectively chosen
 16 to waive an objection to the removal by a nimble non-forum
 17 defendant who thereafter removes the case before service
 18 upon a forum defendant named in the complaint. And, even
 19 when a forum defendant is served first, my reading
 20 anticipates a situation in which an unserved non-forum
 21 defendant may remove following service on a forum
 22 defendant, in hopes of arguing that joinder of the
 23 forum defendant was fraudulent. This reading of the statute
 24 thus accommodates the clear congressional purpose
 25 animating section 1441(b)—preventing abuse by plaintiffs in
 26 forum selection—while also closing an unintended loophole
 27 incentivizing parallel abuse by defendants seeking to escape a
 28 state forum in which a co-defendant is a citizen, all without
 doing violence to the plain language of the statute.

Id. at 322–23.

21 The court agrees with Judge Woodlock and adopts the same reasoning. Thus, Chicago
 22 Title could not remove prior to being served. The possibility of snap removal notwithstanding,
 23 Chicago Title’s removal in this case was procedurally defective.

24 Accordingly, the court finds that remand is appropriate unless Ticor Nevada, the forum
 25 defendant, was fraudulently joined.

26 **B. Fraudulent joinder**

27 Before the court may remand this case, however, it must address Chicago Titles
 28 remaining argument. Chicago Title believes that Ticor Nevada, which acted “simply as the title

1 agent with respect to the issuance of the title policy,” was fraudulently joined in this action to
2 improperly thwart removal. (ECF No. 40 at 13–16).

3 An exception to the requirement of complete diversity exists where a non-diverse
4 defendant has been “fraudulently joined.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067
5 (9th Cir. 2001). “[F]raudulently joined defendants will not defeat removal on diversity grounds.”
6 *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (citations omitted).
7 “Fraudulent joinder is a term of art.” *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th
8 Cir. 1987). “There are two ways to establish fraudulent joinder: ‘(1) actual fraud in the pleading
9 of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the
10 non-diverse party in state court.’” *GranCare, LLC v. Thrower*, 889 F.3d 543, 548 (9th Cir.
11 2018) (quoting *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)).

12 “If the plaintiff fails to state a cause of action against a resident defendant, and the failure
13 is obvious according to the settled rules of the state, the joinder of the resident defendant is
14 fraudulent.” *McCabe*, 811 F.2d at 1339; *see also Ritchey*, 139 F.3d at 1318 (“[A] defendant
15 must have the opportunity to show that the individuals joined in the action **cannot be liable on**
16 **any theory.**” (emphasis added)). Conversely, “if there is a *possibility* that a state court would
17 find that the complaint states a cause of action against any of the resident defendants, the federal
18 court **must** find that the joinder was proper and remand the case to the state court.” *GranCare,*
19 *LLC*, 889 F.3d at 548 (bold emphasis added; italic emphasis in original).

20 “Fraudulent joinder must be proven by clear and convincing evidence.” *Hamilton*
21 *Materials Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). The Ninth Circuit has
22 “made it clear that the party invoking federal court jurisdiction on the basis of fraudulent joinder
23 bears a ‘heavy burden’ since there is a ‘general presumption against fraudulent joinder.’”
24 *Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d 1110, 1113 (9th Cir. 2016) (quoting *Hunter*,
25 582 F.3d at 1046).

26 Here, Chicago Title argues that Carrington failed to allege claims against Ticor Nevada
27 as a “title agent,” which is defined by NRS 692A.060, as opposed to a “title insurer,” as defined
28 by NRS 692A.070. (ECF No. 40 at 13). Thus, Chicago Title urges that Ticor Nevada is not a

1 party to the insurance contract, owed no contractual duties to Carrington, and therefore cannot be
2 held liable on any of Carrington's currently pleaded theories. *Id.* at 14. However, Carrington
3 contends (1) "Ticor [Nevada] was a signatory to the policy and explicitly listed as the insuring
4 company" and (2) "to the extent Ticor [Nevada] was not an insurer, Carrington should be able to
5 amend its complaint to reflect allegations against Ticor Title as an agent." (ECF No. 43 at 7–8).

6 Chicago Title posits that granting Carrington leave to amend its complaint to allege
7 claims against Ticor Nevada as a title agent would be futile. (ECF No. 40 at 14). Carrington
8 disagrees, arguing it has standing because it "stands in the original lender's shoes with respect to
9 the policy." (ECF No. 43 at 8). Carrington further argues that its claims against Ticor Nevada as
10 an agent would not be time-barred. *Id.* at 8–9.

11 The court finds that Chicago Title has not borne its "heavy burden" to show, by clear and
12 convincing evidence, that Carrington's failure to state a cause of action against Ticor Nevada is
13 obvious according to the settled rules of the state. Carrington's complaint alleges that Ticor
14 Nevada was a signatory and insurer under the policy. (ECF No. 1-2 at 2–3). Carrington now
15 argues that "[p]erhaps Ticor Title made a mistake by including itself as an insurer on the policy.
16 If so, it may have defenses against Carrington's claims. But that does not mean Carrington
17 fraudulently joined it." (ECF No. 13 at 8). Further, the purported defect in Carrington's
18 complaint is only that it treats Ticor Nevada as a title insurer rather than a title agent. Even
19 assuming the truth of this argument, Ticor Nevada may be liable on another state law theory in
20 light of the possibility of fruitful amendment to Carrington's complaint.

21 While plaintiff may not ultimately recover against [defendant], this does not mean that
22 [defendant] was fraudulently joined. In assessing whether a defendant was fraudulently joined,
23 the court need not look extensively at the merits of the claims" *Milligan v. Wal-Mart*
24 *Stores, Inc.*, No. 2:14-CV-1739 JCM CWH, 2014 WL 7240162, at *3 (D. Nev. Dec. 18, 2014)
25 (citation omitted). The court finds that there is a *possibility* that a state court would find that the
26 complaint states a cause of action against Ticor Nevada.

1 Accordingly, the court finds that Ticor Nevada is not fraudulently joined and, as a result,
 2 defeats diversity jurisdiction under the forum defendant rule. Remand is necessary, and the court
 3 grants Carrington's motion.

4 **C. Attorneys' fees**

5 Under the "American rule," litigants generally must pay their own attorneys' fees in the
 6 absence of a rule, statute, or contract authorizing such an award. *See Alyeska Pipeline Co. v.*
 7 *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). One such statute is 28 U.S.C. § 1447(c), which
 8 provides that "[a]n order remanding the case may require payment of just costs and any actual
 9 expenses, including attorney fees, incurred as a result of the removal." Under this provision, the
 10 decision whether to award attorney's fees "is left to the district court's discretion, with no heavy
 11 congressional thumb on either side of the scales." *Martin v. Franklin Capital Corp.*, 546 U.S.
 12 132, 139 (2005).

13 That is not to say the courts' discretion is unlimited. *See id.* at 139–140 ("Discretion is
 14 not whim," but should be "guided by sound legal principles."). The Supreme Court has held that
 15 "absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the
 16 removing party lacked an objectively reasonable basis for seeking removal." *Id.* While the
 17 Supreme Court has not defined what makes removal objectively unreasonable, the Ninth Circuit
 18 has looked to the clarity of the relevant law at the time of removal. *See Lussier v. Dollar Tree*
 19 *Stores, Inc.*, 518 F.3d 1062, 1066 (9th Cir. 2008) ("[T]he test is whether the relevant law clearly
 20 foreclosed the defendant's basis of removal.").

21 In light of the foregoing discussion, the court notes that the law pertaining to snap
 22 removal is unsettled. Thus, the court finds that Chicago Title's removal was reasonable and
 23 declines to award Carrington attorneys' fees. Carrington's motion is denied.

24 **IV. Conclusion**

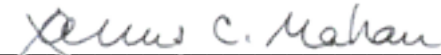
25 Accordingly,

26 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Carrington's motion to
 27 remand (ECF No. 13) be, and the same hereby is, GRANTED.
 28

1 IT IS FURTHER ORDERED that Carrington's motion for attorneys' fees (ECF No. 14)
2 be, and the same hereby is, DENIED.

3 IT IS FURTHER ORDERED that the matter of *Carrington Mortgage Service, LLC v.*
4 *Ticor Title of Nevada, Inc. et al.*, case number 2:20-cv-00699-JCM-NJK, be, and the same
5 hereby is, REMANDED to the Eighth Judicial District Court in Clark County, Nevada.

6 DATED July 10, 2020.

7 
8 UNITED STATES DISTRICT JUDGE